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04-CV-200

February 14, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of
The United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

***Re: Comments on Proposed Amendments to the Federal Rules of Civil Procedure Regarding Electronic Discovery***

Dear Mr. McCabe:

Iron Mountain Incorporated ("Iron Mountain") hereby submits the following comments on the Proposed Amendments to Rules 26(b)(2) and Rule 37(f) that were circulated for comment in August, 2004.

Iron Mountain is an experienced provider of outsourced records and information management services in North America, Latin America and Europe. In addition to storing large quantities of paper records for businesses, medical institutions and governmental agencies, Iron Mountain stores more than twenty million items of computer media at approximately sixty (60) locations in the United States, plus many locations in Latin America and Europe. In addition, Iron Mountain is a leader in the field of digital archiving. Further, Iron Mountain provides consulting services in the fields of records management and retention services for a broad range of clients. Based on its many years' activity in storing magnetic media for customers, and advising clients on storage of information in electronic format, Iron Mountain is familiar with records storage and management practices in the United States and many other countries. As an adjunct to our storage of magnetic media and operation of digital archives, we perform services to extract information from back-up and archival tape for customers.

On the basis of our knowledge of how companies store electronically stored information, we offer the following comments, focused principally on the proposed amendment to Rule 26(b)(2), with related comments on proposed Rule 37(f).

**Rule 26(b)(2), Reasonably Accessible Information**

The proposed amendment to Rule 26(b)(2) makes critical the distinction between electronically stored information that is reasonably accessible and that which is not reasonably accessible. The note to proposed Rule 26(b)(2) reflects the Committee's recognition that information stored for disaster recovery purposes can be expensive and difficult to use for other purposes, such as searching for specific data. Other

commentators have adequately testified to the point that disaster recovery data, generally preserved on individual tapes in a back-up format, is difficult and expensive to search for individual subjects, emails or persons. The reason for the difficulty is the limited cataloging of information in a back-up format. While information in a data recovery (or back-up) format may still be subject to discovery by the process established by proposed Rule 26(b)(2), there is a rebuttable presumption that information maintained for disaster recovery purposes is not reasonably accessible because of the expense of searching it.

As the Committee has recognized, disaster recovery data generally has a short life. Back-up or disaster recovery tapes are generally written over after a few days or a few weeks, because the information on them is no longer relevant. By the time they are scheduled to be overwritten, the information on such tapes is stale and useless.

It is Iron Mountain's observation, however, that many enterprises keep disaster recovery tapes for extended periods of time. Companies use disaster recovery tapes as a relatively inexpensive way to archive information. Information officers recognize that retrieval of information from tapes in a back-up format may be time-consuming and expensive, but they also know that converting information in a back-up format to an easily searchable archival format is costly. Knowing that, they often make a perfectly rational evaluation that the low likelihood of ever having to access information in a back-up format counterbalances the potentially high cost of search, when compared to the high cost of converting back-up format to archival format. In other words, they weigh, on the one hand, the relatively high cost of converting material from a back-up format to an archival format, which is much easier to service, against the lower cost of continuing to store information in a back-up format which would mean a high cost of retrieving the information in the unlikely event that it was ever needed. Simply put, companies often store information in a back-up format long after it has lost its value for disaster recovery purposes, and they do so for good business reasons. In short, companies often store information for archival purposes in a back-up format.

Because the proposed amendment to Rule 26(b)(2) places significant weight on the concept of reasonable accessibility, and accepts the concept that disaster recovery information is not reasonably accessible, it seems likely that, if the proposed rule is adopted, cost-shifting and other mechanisms available to courts in balancing the burdens and benefits of discovery requests will be shifted toward the requesting party, when the reason for the lack of reasonable accessibility was a business decision on the part of the responding party.

Iron Mountain does not wish to advocate that cost-shifting under the above-described circumstances is a good thing or a bad thing. We wish merely to make sure that the Committee understands the dynamics of the decision-making process at many companies, and how that process affects the format in which electronically stored information is kept.

If the Committee were to determine this is an issue that should be addressed in the proposed amendment, one way of doing so would be to state in the Committee Note to Subdivision (b)(2) that information will be considered stored for disaster recovery purposes only for a limited period after the information was created, and that information kept for a longer period will not be considered held for disaster recovery purposes, and will not be considered not reasonably accessible solely by reason of the fact that it is in a back-up, as opposed to archival, format. Alternatively, the Committee Note could state that whether information in a back-up format is stored solely for disaster recovery purposes is a matter for the court to decide, based on information presented in the case, but that the length of the period information was retained, whether it had been superseded by more recent data and the circumstances under which the information is accessed, as well as the format of the information, would be taken into account in determining whether data was held for disaster recovery purposes or archival use.

**Rule 37(b), Sanctions Safe Harbor**

The proposed amendment concerning Rule 37(f) provides that, absent a court order, a party from which discovery is sought is not subject to sanctions for failing to provide the information if the information was lost through routine operation of the party's electronic information system, and the party took reasonable steps, after it knew (or should have known) the information was discoverable in the action, to preserve the information.

Iron Mountain has two concerns regarding proposed Rule 37(f). The first relates to the problem regarding reasonably accessible information discussed above in connection with proposed Rule 26(b)(2). Under proposed Rule 37(f), a party is excused from sanctions if it took reasonable steps in a timely manner to preserve information that it knew (or should have known) was "discoverable". If the term "discoverable" means information that was reasonably accessible, as well as relevant to the subject matter of the litigation, then relatively little information would be discoverable in the context of proposed Rule 37(f), because its most likely application is to disaster recovery information, and almost by definition disaster recovery information is not reasonably accessible because it is expensive to search. To solve this issue, the Committee Note in respect of subdivision (f) might clarify that the word "discoverable" is not meant to import whether the information is reasonably accessible.

Iron Mountain's second concern with proposed Rule 37(f) is that it is unclear how it works. That is to say, a party has the benefit of the safe harbor protection against sanctions due to destruction of evidence stored electronically when the destruction occurred from routine operation of the party's electronic information system only if the party took timely, reasonable steps to preserve the lost information. In the context of Rule 37(f), the steps taken by the party were clearly ineffective; otherwise, the information would have been preserved, and no question of sanctions would have arisen. It seems that the only steps that would be reasonable in these circumstances would be that the party distributed an adequate communication with its organization, directing

appropriate personnel not to destroy or overwrite (or permit the automatic destruction or overwriting of) media, but notwithstanding that directive, through inadvertence or carelessness, the destruction nonetheless occurred. Our concern is that there may be no possible circumstance in which "reasonable steps" were timely taken by a party, yet the sought information was destroyed through routine operation of the party's electronic information system. In other words, the fact that the steps taken to preserve were unsuccessful may be tantamount to a determination that the steps were not reasonable. Perhaps this concern could be relieved by some explanatory language in the Committee Note on proposed Subdivision (f), describing what is meant by "reasonable steps".

Iron Mountain appreciates this opportunity to comment on the proposed Rules. If the Committee has any questions concerning the comments in this letter, the undersigned would be prepared to respond at your request.

Respectfully,

C. Richard Reese

C. Richard Reese
Chairman